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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002285-MR

APPALACHIAN REGIONAL
HEALTHCARE, INC., D/B/A
MIDDLESBORO ARH — APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING JR., JUDGE
ACTION NO. 05-CI-00367

RAY TYLER VANHUSS;
MEREDITH J. EVANS, M.D.;
AND CAROL E. ROSE, M.D. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, MOORE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Appalachian Regional Healthcare, Inc., d/b/a Middlesboro ARH (Appalachian Regional) brings this appeal from an October 13, 2008, amended judgment of the Bell Circuit Court awarding Ray Tyler VanHuss damages in the amount of $387,800. We affirm.

On August 10, 2004, VanHuss was admitted to the Lee Regional Medical Center in Virginia complaining of abdominal pain, fever, nausea and vomiting. After his admission, a CT scan of VanHuss's abdominal area revealed a mass in the upper right abdomen. On August 17, 2004, Hossein Faiz, M.D. performed exploratory surgery on VanHuss and ultimately discovered a large inflamed mass from which he removed a foreign object (surgical sponge). It was determined by Dr. Faiz that the sponge was left in VanHuss's abdominal cavity during a 1978 surgical procedure (exploratory laparotomy) performed at Appalachian Regional. During the 2004 surgery, only portions of the sponge could be removed because of its deteriorated condition. Thus, Dr. Faiz placed a surgical drain in VanHuss's abdomen to drain the abscess and sponge material remaining in the abdomen. The drain required daily irrigation for the following three years until it was finally removed.

On July 25, 2005, VanHuss filed a complaint in Bell Circuit Court against Appalachian Regional, Meredith J. Evans, M.D., and Carroll E. Rose, M.D.[1] The matter proceeded to jury trial. Ultimately, the jury returned a verdict in favor of VanHuss and solely against Appalachian Regional in the amount of $387,800 ($125,000 in medical expenses and $262,800 in pain and suffering). This appeal follows.

[1] Meredith J. Evans, M.D. and Carroll E. Rose, M.D. were named as possible surgeons who performed the 1978 procedure on Ray Tyler VanHuss. However, the jury did not find either of them liable.

Appalachian Regional contends the trial court erred by excluding evidence that VanHuss's damages "were caused by the acts or omissions of the subsequent treating physician, Hossein Faiz." In particular, Appalachian Regional argues:

> Proximate cause is causation in fact, or substantial cause. "The negligence must also be a substantial factor in bringing about the plaintiff's harm. The word 'substantial' is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called 'philosophic sense,' which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called 'philosophic sense,' yet the effect of many of them is so significant that no ordinary mind would think of them as causes." *Id.*, at 144 *citing* Restatement of Torts, Second, Sec. 431, Comment a [sic].
>
> Applying those principals to this appeal, the Trial Court erred in prohibiting the Appellant from asserting the conduct of Dr. Faiz as the proximate cause of Mr. Vanhuss'[s] damages. The original negligence of leaving the sponge in is nothing more than a "philosophic sense" type of cause. The substantial cause was, as a matter of law, the removal of the sponge, and in so doing unsealing the sterile, walled off abscess, that resulted in the Appellee's damages.

Appalachian Regional's Brief at 11-12. We disagree with Appalachian Regional's argument.

In this Commonwealth, we have adopted the legal causation standard found in *Restatement (Second) of Torts* § 431 (1965). Thereunder, an actor's

negligent act is the legal cause of harm if (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm. *Bailey v. N. Am. Refractories Co.*, 95 S.W.3d 868, 871 (Ky. App. 2001)(quoting *Restatement (Second) of Torts* § 431 (1965)). Under § 431 of the *Restatement (Second) of Torts*, the question of legal cause may be one of law or of fact, and it is incumbent upon the court to determine "whether the evidence as to the facts makes an issue upon which the jury may reasonably differ as to whether the conduct of the defendant has been a substantial factor in causing the harm to the plaintiff." *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 92 (Ky. 2003).

In this case, it is beyond reasonable dispute that a surgical sponge or gauze was left in VanHuss's abdominal cavity during a 1978 surgical procedure at Appalachian Regional, that Dr. Faiz removed portions of the sponge during a subsequent surgery, and that Dr. Faiz inserted a surgical drain to drain the abscess and remaining sponge material. As such, the evidence clearly demonstrates that the negligent abandonment of the sponge in VanHuss's abdominal cavity in 1978 was a substantial factor in causing VanHuss's subsequent injuries; i.e., the surgery to remove the sponge and resulting health issues. However, Appalachian Regional sought to introduce evidence that Dr. Faiz's medical treatment was the legal cause of VanHuss's subsequent injuries.

In *Deutsch v. Shein*, 597 S.W.2d 141 (Ky. 1980), the Supreme Court held:

> It is established law that the "injured person is required to use ordinary care and reasonable diligence to secure appropriate treatment of the injury; when he has exercised that care, he may recover damages to the full extent of his injuries, even though the doctor engaged for such treatment omits to use the most approved remedy, or the best means of cure, or fails to exercise as high a degree of care or skill as another doctor might have."

Id. at 145 (quoting *Brown Hotel Co. v. Marx*, 411 S.W.2d 911, 915 (Ky. 1967)). Here, VanHuss reasonably secured the medical care of Dr. Faiz; it is immaterial whether Dr. Faiz "fail[ed] to exercise as high a degree of care of skill as another doctor might have." *Deutsch*, 597 S.W.2d at 145. As succinctly stated in *Deutsch*, "[h]aving put [plaintiff] in a position from which it was reasonable to seek the medical services of other doctors, [tortfeasor] is responsible for any injury to her resulting from her exposure to the risk involved in these medical services." *Id.* at 145. Similarly, Appalachian Regional is responsible for the injury resulting from VanHuss's exposure to medical services after having placed VanHuss in a position to require such services. *See id.*

Additionally, Dr. Faiz's actions do not constitute a superseding cause as the subsequent surgery to remove the sponge from VanHuss's abdominal cavity was entirely foreseeable. *See NKC Hospitals, Inc. v. Anthony*, 849 S.W.2d 564 (Ky. App. 1993)(holding that an intervening act will only be considered a superseding cause when it was not reasonably foreseeable by the original actor).

Next, Appalachian Regional argues that the trial court committed reversible error by failing to tender a jury instruction apportioning fault to an

unknown surgeon and/or Dr. Faiz. The record reveals that neither the unknown surgeon nor Dr. Faiz was named as a party to the action. In this Commonwealth, the law is well settled that a jury may only apportion fault in a negligence action to named parties or to those parties who have previously settled. *Jefferson Co. Com. Att'ys Office v. Kaplan*, 65 S.W.3d 916 (Ky. 2002). If Appalachian Regional wished an apportionment instruction against the unknown surgeon or Dr. Faiz, it was incumbent upon Appalachian Regional to have named such parties as third party defendants. Kentucky Rules of Civil Procedure (CR) 14.01; *Ky. Farm Bureau Mutual Ins. Co. v. Ryan*, 177 S.W.3d 797 (Ky. 2005). As the unknown surgeon and Dr. Faiz were not parties, the trial court properly refused to submit a jury instruction apportioning fault to them. *See Kaplan*, 65 S.W.3d 916.

Appalachian Regional finally asserts that the jury's award of damages in the amount of $387,800 was improper. In particular, Appalachian Regional contends: (1) the trial court erred by ruling that it stipulated to $125,000 as the amount of medical expenses incurred by VanHuss, and (2) the jury verdict of $262,800 for pain and suffering was "grossly excessive." Appalachian Regional's Brief at 16. We address each contention *seriatim*.

Appalachian Regional argues that it did not stipulate to $125,000 as constituting the amount of VanHuss's medical expenses but rather only stipulated that the amount of $125,000 represented the medical expenses "at issue." Appalachian Regional's Brief at 16. Consequently, Appalachian Regional

contends that the "burden" should have remained upon VanHuss to prove the amount of medical expenses to the jury.

We have reviewed the videotaped record of a bench conference between the parties and the judge that occurred during the trial on August 28, 2008. The issue before the trial court was the proper amount of medical expenses incurred by VanHuss. It was argued that some of the claimed medical expenses were incurred for medical conditions unrelated to the surgical removal of the sponge and, thus, were uncompensable. At the end of the bench conference, it is clear that Appalachian Regional's counsel agreed to stipulate that VanHuss's medical expenses were $125,000. In no way did Appalachian Regional condition such stipulation or restrict such stipulation, Appalachian Regional simply agreed to the stipulation. As such, we cannot say the trial court erred by submitting to the jury that $125,000 represented the stipulated amount of medical expenses incurred by VanHuss.

Appalachian Regional also believes that the jury's verdict of $262,800 for pain and suffering was excessive. Following the jury's verdict, Appalachian Regional filed a motion for a new trial, to vacate judgment and for judgment notwithstanding the verdict under CR 59. Therein, Appalachian Regional argued error as to the excessiveness of the jury's verdict for pain and suffering. In a November 7, 2008, order denying the motion, the trial court determined the verdict was not excessive and reasoned:

> At first blush, the Court, in its discretion, does not find that the jury's verdict meets the standard of Rule 59.01(d). A jury is allowed to draw its own inferences based upon the evidence. It is entirely reasonable for a jury to conclude that a man is simply being stoic when he says that an open, puss filled wound "does not hurt too much." [Appalachian Regional's] argument presupposes two key facts. The first is that the jury followed [VanHuss's] counsel's formula from closing arguments verbatim, as opposed to awarding $20 for twelve hours a day, or even using a mathematical formula at all. The second is that just because [VanHuss] and his witnesses did not directly testify as to difficulty and/or pain and suffering while sleeping, it necessarily follows that none such occurred. Again, that [VanHuss] experienced pain in the evenings is a perfectly reasonable inference for the jury to draw. The Court is not in the business of reading jurors' minds, nor does it need to be, since the award of pain and suffering clearly passes the first blush rule

When a jury's verdict is challenged upon the ground of excessiveness or inadequacy, the trial court must determine:

> [W]hether the jury's award appears "to have been given under the influence of passion or prejudice or in disregard of the evidence or the instructions of the court." CR 59.01(d). This is a discretionary function assigned to the trial judge who has heard the witnesses firsthand and viewed their demeanor and who has observed the jury throughout the trial.

Davis v. Graviss, 672 S.W.2d 928, 932 (Ky. 1984) *overruled on other grounds by Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483 (Ky. 2002). As an appellate court, our role is limited to reviewing the trial court for an error of law and specifically:

> There is no error of law unless the trial judge is said to have abused his discretion and thereby rendered his

> decision clearly erroneous. Further, the action of the trial judge is presumptively correct.

Davis, 672 S.W.2d at 932 (quoting *Prater v. Arnett*, 648 S.W.2d 82, 86 (Ky. App. 1983)).

In the case *sub judice*, the evidence at trial established that VanHuss endured abdominal surgery to remove portions of the sponge and endured a surgical drain placed at the surgical site for three years. Also, nearly every day for some three years home health professionals would irrigate and repack the area around the drain. Moreover, there was evidence that VanHuss was subject to additional surgical procedures to maintain the drain. Simply stated, the trial record is more than replete with evidence upon which a jury could reasonably base its award of $262,800 for pain and suffering. Thus, we hold that the trial court did not abuse its discretion by denying Appalachian Regional's CR 59 motion based upon the excessiveness of the jury verdict for pain and suffering.

For the foregoing reasons, the amended judgment of the Bell Circuit Court is affirmed.

ALL CONCUR.

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